



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**SUCCESSION CAUSE NO. 364 OF 2012**

**IN THE MATTER OF THE ESTATE OF THE LATE WANJOHI GAKERA ..... DCD**

**NELSON KARIUKI GAKERA.....APPLICANT**

**V E R S U S**

**SUSAN WANGECHI KIMANI.....1<sup>ST</sup> RESPONDENT**

**SIMON MURIITHI KIMANI.....2<sup>ND</sup> RESPONDENT**

**WILLIAM MUTHIKE KIMANI.....3<sup>RD</sup> RESPONDENT**

**MOSES NDUBAI KIMANI.....4<sup>TH</sup> RESPONDENT**

**IBRAHIM MUTHII KIMANI .....5<sup>TH</sup> RESPONDENT**

**EUNICE WANGARI KIMANI FOR SUSAN,ESTHER,**

**IMMANUEL.....6<sup>TH</sup> RESPONDENT**

**NJOGU NDERI KINYUA .....7<sup>TH</sup> RESPONDENT**

**ANDREW KINYUA GAKUO.....8<sup>TH</sup> RESPONDENT**

**DAVID WAITA KAGWI .....9<sup>TH</sup> RESPONDENT**

**ROSEMARY WANJIKU WANJOHI.....10<sup>TH</sup> RESPONDENT**

**DAVID MWANGI NGARI.....11<sup>TH</sup> RESPONDENT**

**RAPHAEL MWAURA NJERI .....12<sup>TH</sup> RESPONDENT**

**PRISCILLA WANJIRU MATHENGE.....13<sup>TH</sup> RESPONDENT**

**NELSON KARIUKI .....14<sup>TH</sup> RESPONDENT**

**RAPHAEL MWAURA NJERI .....15<sup>TH</sup> RESPONDENT**

**JEREMIAH KIBIRU KUMUNGA .....16<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. This matter relates to the Estate of Wanjohi Gakera, deceased. A petition for a Grant of Letters of Administration to the Estate of the deceased was filed by Susan Wangechi Kimani (1<sup>st</sup> Respondent) in her capacity as the sister of the deceased. A grant was issued on 16/12/2004 and confirmed on 9/3/2006. The estate of the deceased comprised in Land Parcel No. Mwerua/Kagio/642 was distributed to the

following:

- a) Susan Wangechi Kimani – 1.60 acres
- b) William Muthike Kimani – 0.90 acres
- c) Simon Mureithi Kimani – 0.90 acres
- d) Moses Ndubai Kimani – 0.90 acres
- e) Ibrahim Muthii Kimani – 0.90 acres
- f) Neslon Kariuki Kimani – 0.90 acres
- g) Eunice Wangari Kimani – 0.25 acres
- h) SN 11 years (minor)     }
- i) EW 11 years (minor)     } – 0.25 acres
- j) IK 6 months (minor)     }

2. A summons for revocation or annulment of grant dated 29/9/09 was filed by Nelson Kariuki Gakera claiming that the grant was obtained fraudulently by making of a false statement or by concealment from the court of something material to the case, and/or that the grant was obtained by means of untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.

3. The 1<sup>st</sup> respondent, Susan Wangechi filed a Replying Affidavit sworn on 14/1/2010, 2/9/2014 and 22/10/2014.

#### **Applicant's case**

That the deceased was not married and had no children at the time of his death but was survived by 3 siblings Bernard Murimi, the petitioner and himself. That the petitioner got married to Josh Kimani in the 1960s and she has parcel of land **Mutithi/Chumbiri/461**. That she filed the succession cause secretly without their consent or knowledge and failed to disclose their existence. That at the time of confirmation of grant, she had made an untrue allegation of fact that there are no survivors of the deceased apart from herself and her children.

**Mwerua/Kagio/642** was subdivided into **Mwerua/Kagio/3507, 3508, 4100-4117, 4121-4126 and 5131-5151** and 15 respondents who were the registered owners of the subdivided estate were enjoined to the suit.

#### **1<sup>st</sup> Respondents' case**

In response she stated that in 2004 she applied for confirmation of grant of her late brother's estate and was issued with certificate on 09/03/2006. That the estate was subdivided into 8 portions and each dependant given their title deed. That she later subdivided her portion into 12 portions **Mwerua/Kagio/4106-4117** and sold **Mwerua/Kagio/4109, 4110, 4111, 4116 and 4117**. That her children and herself have built houses on 4 portions being **Mwerua/Kagio/4106, 4107, 4112 and 4113**. That she has lived on the land since 1970 having been instructed by her father to settle therein after the death of the deceased. That the applicant has been aware of the developments on the land since 1970 and the orders sought are incapable of being enforced since the court cannot stop what has already taken place.

#### **2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 14<sup>th</sup> Respondents' case**

They are the 1<sup>st</sup> respondent's children who have lived on the suit land all their lives and even constructing their houses. That the applicant has been aware of the developments.

#### **Njogu Nderi Kinyua, 7<sup>th</sup> respondents case**

He stated that he bought **Mwerua/Kagio/4109** from the 1<sup>st</sup> respondent on 06/03/2010 and has not constructed any building therein. That he is a purchaser for value and has clean title.

The court granted the applicant leave to serve 8<sup>th</sup> – 13<sup>th</sup>, 15<sup>th</sup> and 16<sup>th</sup> respondents by way of substituted service by affixing summons in all the court notice boards within Kirinyaga County.

#### **Rosemary Wanjiku Wanjohi 10<sup>th</sup> respondents case**

She stated that she bought **Mwerua/Kagio/4111** from the 11<sup>th</sup> respondent and obtained title deed on 23/06/201. That she has been in active occupation developed the same. That as a purchaser for value her certificate of title is protected and cannot be invalidated by revocation

and/or annulment of grant.

### **Bernard Murimi Gakera's case**

He is the brother to the applicant and the 1<sup>st</sup> respondent. That their father had 4 wives and they are the children of the 1<sup>st</sup> wife Alice Wakariti who had 5 children as follows;

- 1) **Josephine Wamarwa (deceased with 11 survivors)**
- 2) **Susan Wangechi**
- 3) **Wanjohi Gakera (deceased with no survivors)**
- 4) **Nelson Gakera**
- 5) **Bernard Murimi**

4. That the clan gave him **Mwerua/Kagio/644**, Wanjohi Gakera - **Mwerua/Kagio/642** and Nelson Gakera - **Mwerua/Kabiriri/71**. That their sisters were married. That the 1<sup>st</sup> respondent has **Mutithi/Chumbiri/461** and land in Rukanga and Plots in Mutithi. That the 1<sup>st</sup> respondent and her husband previously live with their brother-in-law but after they were chased their father allowed them to occupy the suit land temporarily. That the 1<sup>st</sup> respondent and her children have lived on the suit land all their lives. That she filed the succession cause behind their backs and did not even involve their mother who passed away in 2013. That they are all entitled to share in their brother's land and the 1<sup>st</sup> respondent will get a share of their father's land.

5. The court had ordered that all the respondents who would be affected by the decision of this court be served. There are various affidavits of service showing that they were served.

6. The court gave directions that the that summons for revocation of grant be heard by way of viva voce evidence. The parties adduced evidence. Submissions were filed at the close of the case.

7. For the applicant it is submitted that there is no dispute that the estate belonged to the Wanjohi Gakera, deceased who died intestate and did not leave behind a wife or children. That the deceased had four siblings and that one Josephine Wamarwa is deceased. The other is Benard Murimi. The deceased was the registered owner Mwerua/Kagio/642 measuring 6.35 acres. That the 1<sup>st</sup> respondent admitted that she did not involve her siblings or even inform them of the succession cause.

8. That there was a bad intention as the Chief's letter was issued in accordance with the affidavit of the 1<sup>st</sup> respondent which is not normally the case. That at the time the cause was filed the mother of deceased was still alive and had priority. That there is clear admission that the 1<sup>st</sup> respondent concealed material facts from court.

9. It is further submitted that under **Section 39 of the Law of Succession Act Cap 160 Laws of Kenya** is clear that where one dies leaving no spouse or children, the estate is distributed to the closest person according to the degree of consanguinity and affinity. That the applicant has proved his case.

10. For the 1<sup>st</sup>, 7<sup>th</sup> & 14 respondents it was submitted that under **Section 39 of the Law of Succession Act**, since the deceased had not left a surviving spouse is estate devolved to his father under **Section 39(1)(a)**. He inturn bequeathed the land to the 1<sup>st</sup> respondent and he had capacity to do so since the estate had devolved to him by the operation of the law. That this was buttressed by the Chief's letter.

11. It is further submitted that **Section 93 of the Law of Succession Act Cap 160** provides that the validity of the transfer is not affected by the revocation of grant. The respondent relies on **Civil Appeal No. 184/2008 Court of Appeal**.

12. For the tenth respondent, it was submitted that she, Rosemary Wanjiku Wanjohi is currently the registered proprietor of Land parcel No. Mwerua/Kagio/4111 having purchased the same from the Mwangi Ngari who had also purchased from 1<sup>st</sup> respondent . That at the time she entered the sale agreement the said David Mwangi Ngari had already obtained a title deed and so she did not deal with the 1<sup>st</sup> respondent.

13. That the 1<sup>st</sup> respondent obtained a clean title having been a purchaser for value without notice. She relies on **Section 93 of the Law of Succession Act** which provides:-

*“Validity of transfer not affected by revocation of representation (1) A transfer of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.*

*(2) A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties and legacies of the deceased have not been discharged nor provided for.”*

14. That the Section protects the title of a purchaser for value notwithstanding the revocation of grant and the title of the 10<sup>th</sup> respondent should be protected.

15. I have considered the application, the evidence tendered and the submissions. There are two issues which arise for determination.

a) **Who are the rightful beneficiaries of the estate of the deceased.**

b) **Revocation of grant.**

**Who are the rightful beneficiaries:**

I have to look back to the documents used in filing the cause. The affidavit in support of the summons for confirmation of grant states that the deceased Wanjohi Gakera died in 1964. The cause was filed without the production of a death certificate. **Section 2 of the Law of Succession Act** (to be referred to as the 'Act') provides for the application of the Act. **Section 2(1) & (2)** provides:-

*“Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.*

*(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”*

16. The **Act** does not apply to the estate of deceased person who died before the commencement of the Act. It means that the Act does not apply to estates of deceased who died before 1<sup>st</sup> July 1981 the date of the Act. The law which was applicable was the written laws and customs applying at the date of death. However the administration shall commence or proceed so far as possible in accordance with this Act. The Act refers to the date of death and not the date of filing the succession. The law applicable is the customs applying at the time of death.

17. The deceased was a kikuyu man. The date of his death is not in dispute. He died long before the commencement of the **Act**, that is in 1964.

**The Judicature Act Cap 8**

*“3 (2) The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay”.*

18. The application of the customary Law is to guide the courts when dealing with disputes under the customary laws but is limited where the law is repugnant to justice and morality and inconsistent with any written law. The estate of the deceased is governed by the customary law for the reason that the deceased died long before the commencement of the **Act** and the Act provides that it is to govern estates of deceased dying after the commencement and the Act cannot apply in retrospect.

There is some persuasive case law.

**Philis Michere Mucembi V Wamai Muchembi [2010] Eklr**

The deceased died prior to the commencement of Cap 160 and the court held as follows;

**Under Section 2(2) of the law of succession Act.... clearly excludes the distribution of the estate of a person who died before 1.7.1981. Such property must be distributed in accordance to the law of succession that was in place before the law of Succession Act was enacted.**

**On this point, I am persuaded by the decision of my late brother KAMAU Ag. J in HCC Succession Cause No. 935 of 2003. (In the matter of the Estate of the estate of Mwaura Mutungi alias Mwaura Gichigo Mbura (deceased) where he said that where the deceased died prior to the commencement of the law of succession Act the distribution of his estate is strictly governed by the applicable customary law; however the provisions of the law of succession act as provided under Section 2(2) of Cap 160 govern the administration of the said estate. Judge Rawal was of the same view in Nairobi High Court Civil Suit No. 2487/1996.**

**In my considered view, the administration of an estate as envisaged under Section 2(2) does not include distribution of the estate. It only entails the management of the same.**

**In Re The Estate of Josiah Mwangi Kariuki (Deceased) [2009] eKLR**

The deceased herein died before the commencement of the Cap 160 and the court applied the Kikuyu Customary Law. K.H. Rawal J

stated as follows;

**I just have to reiterate, what I have observed herein before, that the estate in this cause cannot be governed by provisions of Law of Succession Act.. and hereby find so.....**

In the book of Eugene Cotran Restatement of Customary Law -2- Chapter -2- Part III Page 11-14 at Page 14 Para 4 – **“intestate succession. Distribution of property”** it stated as follows:-

***“Estate of unmarried man:***

The property of unmarried man, whether land, livestock or movables is inherited as follows:-

- a) By father of alive or, in his absence,**
- b) Shared equally among his full brothers or in their absence.**
- c) Shared equally among his half brothers or in their absence.**
- d) Shared equally among his sons of his full brothers or in the absence.**
- e) Shared equally among the sons of his half brothers or in their absence.**
- f) Shared equally among paternal unless or in their absence.**
- g) Shared equally among sons of paternal uncles or in their absence.**
- h) By the nearest male paternal relatives as determined by Muhiriga or in the unlikely event of there being no male relative on the paternal side.**
- i) By the son of the eldest sister of the deceased.**

19. The evidence tendered is that the deceased pre-deceased his father. In line with the above statement, the estate should have been inherited by his father. The respondent had no right to inherit the estate of her brother where the brother was survived by his father and brothers. Though the respondent depones that her father had given her the land of her brother, she has not produced any evidence to support the allegation. Further more she is claiming a share of the estate of her father who is now deceased. The respondent in the papers which she filed in court did not disclose that the deceased had other siblings and his parents were alive. She had nothing to hide, she should have disclosed the siblings and parents of the deceased so that they could have appeared in court as the procedure and confirm that they had consented to the entire estate going to her. Failure to disclose material facts is sufficient ground to order a grant whether confirmed or not to be set aside.

20. Be thus as it may as I have already stated, the estate of the deceased was governed under the written laws and customs prevailing before the commencement of the Law of Succession Act. The book of Cotran on Restatement of Customary Law Vol-2- by Eugene Cotran on Page 12 & 13 it stated with regard to succession of estates:

***“As regard the daughters it is stated inter alias that daughters do not normally share the inheritance. They live with their mother until they are married. If however a daughter remains unmarried she maybe allocated a piece of land by ‘muramati’ for use during her lifetime, and if she has illegitimate male then they shall inherit her portion after her death.***

***The above proposition of customary law does not fit in any criteria stipulated in Section 3(2) of the Judicature Act namely 11(a) Repugnant to justice and morality or (b) inconsistent with any written law (the law of Succession Act was not in effect at the time of demise of the deceased). In short I shall devolve the estate herein as per the kikuyu customary law and on the basis of substantive justice”***

This relates to a daughter.

#### **In Re Kamuki Mweithi [2002] Eklr**

The deceased dies in 1968 and the court held;

**The Act came into force on 15th July, 1981 long after the death of the deceased.....Hence, undoubtedly the Kikuyu customary laws shall be applicable to this estate the parties being Kikuyu by tribe.....**

**To find out what the Kikuyu customary law is in respect to the facts of this case, one has to fall back on Cotran’s Book of Commentaries on customary law. The Law as to the right of inheritance by the daughters is quite clear and is stated as under. ‘Daughters do not normally share in the inheritance. They live with their mother until they are married. If, however, a daughter remains unmarried, she may be allocated a piece of land by the muramati for use during her life time. On death or subsequent marriage, this normally reverts to the heir out of whose portion the land was given. If, however, she has illegitimate**

*male children, the land is inherited by them.'*

21. The deceased died before the commencement of the Law of Succession Act. The deceased died in 1964. The Act cannot apply in retrospect. Kikuyu customary Law was applicable which was that a sister had no right to inherit the estate of her brother or of her father for that matter. The respondent had therefore no right to file the Succession Cause and to distribute the estate to herself and her children. She obtained the grant through concealment of material facts from court making of untrue allegations of fact essential in point of law to justify the grant. It was also obtained fraudulently by making of false statements, through the Chief's letter that she is the only next of kin and misleading the court that there were no other survivors of the deceased. Under the **Law of Succession Act Cap 160** these are sufficient grounds to warrant the setting aside of the grant. It is provided:

**Section 76 of the Law of Succession Act Cap 160** states;

*A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—*

*a) that the proceedings to obtain the grant were defective in substance*

*b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case.*

*c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently*

In a persuasive decision in the case of **Jamleck Maina Njoroge v Mary Wanjiru Mwangi [2015] eKLR**

The court stated;

**The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. For a grant to be revoked either on the application of an interested party or on the court's own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.**

22. So even under the **Law of Succession Act** the grant issued to the respondent cannot stand.

23. The 1<sup>st</sup> respondent confirms that there is a succession cause for their deceased's father's estate which measures 70 acres and she is involved in the succession. It was not disputed that the brothers of the 1<sup>st</sup> respondent, the applicant, the deceased and Bernard Murimi Gakera were given land by the clan but the petitioner and her sister were not given. This is because in Kikuyu Customary law, married sisters were not being a share since it was presumed they would inherit their husband's share but the law at it is does not discriminate according to gender. The 1<sup>st</sup> respondent is involved in the succession of their father's estate and therefore will be catered for.

24. However, in this instance, the deceased is the brother of the applicant. He was not married and did not have any children therefore his estate should be shared between the three siblings. The 1<sup>st</sup> respondent took out letters of administration by the making of a false statement and by concealment of something material to the case and the grant should be revoked.

25. The respondents claim that they are innocent purchasers for value. **Section 93 of the Law of Succession Act** provides:-

*“(1) A transfer of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.*

*(2) A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties and legacies of the deceased have not been discharged nor provided for.”*

The Act protects a purchaser for value. I have considered the authority cited, **Michael Munene Kaburia –v- Juliana Wanjiku Baragu(2007) eKLR**.

26. The facts are distinguishable as the Judge found there was no proof that the grant was obtained fraudulently. In this case I have pointed out grounds which prove that there were sufficient grounds to revoke the grant.

27. Though titles for innocent purchasers are protected that alone does not bar the court from revoking the grant. It may affect the share of the party who sold after the cause is considered afresh.

28. For the reasons I have stated, I find that the application for revocation has merits. I order that the grant issued on 16/12/2004 and confirmed on 9/3/2006 shall be revoked.

Costs to the applicant.

**Dated at Kerugoya this 3<sup>rd</sup> day of July 2019.**

**L. W. GITARI**

**JUDGE**